53CSR5

RULE TO PETITION THE PUBLIC ENERGY AUTHORITY FOR APPROVAL OF DECOMMISSIONING OR DECONSTRUCTION ACTIVITIES RELATED TO ANY COAL, OIL, OR NATURAL GAS FUELED POWER PLANT
PUBLIC ENERGY AUTHORITY
RESPONSE TO COMMENTS

The West Virginia Public Energy Authority ("Authority") commenced the public comment period for the Emergency Rule 53CSR5 on June 23, 2023. The public comment period concluded on July 23, 2023, after satisfying the thirty (30) day requirement. The purpose of the public comment period was to accept written comments on the Authority's Rule to Petition the Public Energy Authority for Approval of Decommissioning or Deconstruction Activities Related to any Coal, Oil, or Natural Gas Fueled Power Plant.

The Authority received comments from the Sierra Club West Virginia Chapter, Monongahela Power Company and Potomac Edison Company, Appalachian Power, West Virginia Energy Users Group and West Virginia Manufacturers Association, and West Virginia Citizen Action Group. The Comments are reproduced below, along with the Authority's consolidated responses. The original comments received, in their full text (including footnotes), are attached.

The rule was amended in the following ways after the Authority's review and consideration of the comments received.

Changes Made

Section 3.1.1. – References to code were amended for completeness.
Section 4.4.3. – The timeline for submitting a Petition has been amended to one hundred eighty (180) days.
Section 5.1.1.a. – Defined terms were amended for consistency.
Section 6.3. – Notice requirements were amended to include service on the Director of the Public Energy Authority and the Director of the Executive Office of Energy.
Section 6.4. – Reference to section 8.3 was amended to reference section 6.3.
Section 7.6. – Public comment period was amended to allow Petitioner's the opportunity to respond.
8.1.3. – Petitioner's may respond to any additional information requested by the Authority.
Section 8.2.2. – Section 8.2.2. has been removed from the rule.
Section 8.3. – The timeline for resubmittal of Petitions has been clarified.

Comments Received

Sierra Club West Virginia Chapter

1. Section 53-5-6.4 requires "Certification of service to the entities listed in section 8.3 of this rule…". However, section 8.3 appears to be irrelevant to this requirement. Was that supposed to refer to section 6.3?

Response: Yes, the rule has been amended to reference section 6.3.

2. Section 53-5-7 describes a 30-day Public comment period, however, there does not seem to be any mechanism to notify the public of such a comment period. If there are nearby neighbors, plant workers or labor groups, businesses with outstanding claims, or environmental groups such as ourselves, it is not clear how any of us would ever find out about this in time to comment in a meaningful way. I recommend that a standard notice requirement such as "after notice by publication as a Class II legal advertisement in compliance with the provisions of §59-3-1 *et seq.* of this code" be added to the rule.

Response: A legal advertisement to notify the public about the petition process is not required. Any Petition filed with the Authority will be available on the Authority's website.

3. Section 53-5-7.5 specifies that " ...Public comments may be filed electronically on the Authority's website." However, I was not able to find a mechanism on the Authority's website for such public comments. The comment section at the bottom of that web page appears to be directed to the Department of Commerce generally, rather than the PEA specifically, as the same set-up is also on the pages for other boards and commissions. I recommend that the Public Comment mechanisms be established more clearly.

Response: The public comment period mentioned in the rule refers to comments about Petitions submitted to the Authority, not comments about the rule itself. The Authority's website has been updated to include an option to electronically submit comments on Petitions.

4. Section 53-5-8 lays out provisions for the PEA to approve or deny a petition, but there does not seem to be any time limit for the PEA to make such as decision. SB 609 specifies that " such approval may not be unreasonably withheld." (see 5D-1-5c (a)). We recognize that such a decision may take significant time and staff resources, but would be concerned that excessive delays would be tantamount to such approval being "unreasonably withheld". By way of precedent, the WV Public Service Commission "shall render a decision within 300 days..." (24-2-11c b)) for electric generating facilities siting certificates, and it may be useful for the PEA to decide if a longer period is needed in responding to a petition for decommissioning or deconstruction or whether longer than that constitutes a de facto denial.

Response: The lack of a time limit on the issuance of the Authority's decision is not itself a de facto denial.

Monongahela Power Company and Potomac Edison Company

5. Scope (Section 1.1) - The Companies believe that the jurisdiction of these rules should apply to those power plants that are not directly regulated by the Public Service Commission. The PSC holds the power and jurisdiction to decide if a plant can be closed and to govern decommissioning and deconstruction through its orders and depreciation rates approved by the Commission. The depreciation rates of an electric utility charged to customers have cost of removal and salvage components

specifically built into them and thus it is important that the PSC has exclusive authority over decommissioning of retired regulated utility plants to match the rate recovery for decommissioning. A second state agency should not regulate what the PSC already regulates. It very well could lead to different decisions by both agencies or certainly inconsistent requirements. However, merchant plants, such as Pleasants and Longview, are not regulated by the PSC and thus it is appropriate for the PEA to regulate the closing activities of those plants not regulated by the PSC.

Response: The enabling legislation does not distinguish between power plants regulated by the PSC and power plants that are not. The Authority requires the submission of the PSC's order approving decommissioning or deconstruction activities so that the Authority is aware of and can consider the actions of another state agency. But the Authority is mandated to consider factors distinct from those considered by the PSC, and thus, the Authority requires its jurisdiction extend to all power plants.

6. (Section 4.4) - The Companies believe the Authority should not have the right to approve any third-party evaluator to be used by the owner. The applicant should have the right to present its case with whomever the evaluator and witnesses it desires. The third-party evaluator consent proposed rule reads, in essence, "keep trying to find a third-party evaluator until you find one that we like." That requirement should be removed and unreasonably entwines the PEA in the presentation of the case before it to decide. Regardless, while noting the objection to the PEA controlling the presentation, if there is any such third party approval by the PEA, the Authority should have a time limit of no more than 45 days to act and should have finite and objective criteria for any selection.

Response: The Authority is required to approve the third-party evaluator. *See* W. Va. Code § 5D-1-5c(b)(1). The Authority provided examples of possible justifications for third-party evaluators so as not to restrict a Petitioner's selection of a third-party evaluator.

7. (Section 5.1, Petition Requirements) The PEA petition requirements described in Section 5 require a broad range of technical, economic, and social assessments that likely will involve months of study time and hundreds of thousands of dollars of study costs. The requirements are extensive and may have the unintended consequence of incentivizing inaction after a plant stops generating electricity, i.e.., the generator owners may choose to avoid the complex and costly PEA process and do nothing other than to allow the plant to sit and deteriorate over decades.

Response: The information requested by the Authority allows for the Authority's effective decision making.

8. (Section 5.3.1) - While the Companies support conciseness, a petition with a 5- page limit is not practical. The page limit doesn't seem to recognize the magnitude of the requested information and analysis. Most petitions have no page limit, however, if a limit is desirable, the Companies recommend a 20-page limit excluding attachments.

Response: Because the five-page limit does not include attachments, the page limit is sufficient to summarize the findings of the third-party evaluator and state the position of the Petitioner.

9. (Section 8.2) - The Companies believe the legal standard for petition approval should be based on fairness, reasonableness and whether it is in the public interest. It should not be the legal standard in the proposed rule that it would not be unreasonable to approve.

Response: The legal standard requires the authority to fairly and reasonably consider the facts and circumstances presented in the Petition.

10. (Section 8.2.2) -The Companies believe that environmental enforcement and remediation are within the exclusive jurisdiction of the WV Division of Environmental Protection and US EPA. The Companies respectfully believe PEA does not have jurisdiction over environmental matters and their enforcement. Seeking information on environmental matters is different and there is no objection to those provisions in the proposed rule.

Response: Section 8.2.2. has been removed from the rule.

11. (Section 8.3) - If the petition is denied, the rules say it may be resubmitted within 90 days. The Companies believe there should be no time limits on any resubmittal.

Response: The time restriction in §53-5-8.3. has been amended to clarify that Petitioners have ninety (90) days to resubmit the petition without having to serve the required notice and start the process again. After the ninety (90) days expires, Petitioners are free to submit another petition but must start the process from the beginning, serving notice as required by the rule.

12. There should be added a section outlining an appeals process following any adverse decision or denial. It is assumed the appeal would be to the intermediate court of appeals, but the rule should address it for purposes of clarity and due process.

Response: The State's Administrative Procedures Act and the West Virginia Appellate Reorganization Act notice petitioners of any appeal rights. *See* W. Va. Code § 29A-1-1 *et seq.*; W. Va. Code § 51-11-1 *et seq.*

13. (Section 9.2.1) - There are various provisions that give powers to just the Chair, e.g., what information is confidential and in requests for additional information from the petitioner (Section 8.1.1). The Chair is one person from the Authority, and all actions of the PEA should be done by the Authority as a whole and not by just one member of PEA.

Response: The Chair of the Authority has certain duties and administrative functions to streamline the petition process. This was done with the consent of the Authority and for the benefit of Petitioners.

Appalachian Power

14. APCo has several concerns. First, section 4.4.3 of the rule provides that if the Authority approves the Petitioner's choice of a third-party evaluator, the Petitioner shall have ninety (90) days from the issuance of the approval to perfect the petition. APCo feels that (90) ninety days is not sufficient time to perfect the petition once the third-party evaluator has been approved.

Response: The timeline to submit a Petition has been amended to one hundred eighty (180) days, with a provision allowing for Petitioners to request more time if needed.

15. APCo's second concern is that section 5.2.10 requires a detailed list of the upgrades made to a Facility since its original construction, including but not limited to, the purpose of the upgrade, the date the upgrade was made, the date the upgrade was completed, and the cost of the completed upgrade. APCo submits that this requirement would be unduly burdensome given the length of time that APCo's power plants have been in operation.

Response: Please see the response to comment 7 above.

16. APCo's third concern is that sections 5.3 and 5.3.1 of the rule limit a petition to a maximum of five pages without prior approval. With the number of petition requirements that are required in §53-5-5, it would be very difficult to provide all the information required within a mere five pages. With the volume of information that is required to be included, APCo would suggest removing the five-page limit requirement for petitions.

Response: Please see the response to comment 8 above.

17. APCo's fourth concern is that section 8.2 touches upon approval of a petition by the Authority but has no timeline for an approval. APCo suggests that there should be a 180-day deadline for approval or disapproval by the Authority once it has received a petition.

Response: Please see the response to comment 4 above.

18. APCo's fifth concern is that section 9.2 of the rule allows the Petitioner to include a

letter outlining what information in the filing is confidential or proprietary. APCo believes that it is in the best position to determine what information is confidential or proprietary. APCo suggests that the rule be changed to allow for the petitioner to redact confidential and proprietary information and allow the Authority to request more information in a secure manner if it feels more information is needed regarding the redacted material.

Response: The Authority requires access to all information requested to evaluate the Petition. The Authority's redaction aims to protect the Petitioner from disclosure of proprietary information to the public.

West Virginia Energy Users Group and West Virginia Manufacturers Association

19. SB 609 Did Not Designate the PEA as the Final Authority on Decommissioning or Deconstructing Electric Generating Plants.

SB 609 directed the PEA to "propose rules for legislative approval and promulgate emergency rules...to implement this section." West Virginia Code § 5d-1-5c(c). "This section" is a succinct piece of legislation that:

a. Prohibits an "existing coal, oil or natural gas fueled power plant" from undertaking any "decommissioning or deconstruction activities prior to obtaining approval" from the PEA, except that the approval "may not be unreasonably withheld"; and,

b. Requires the filing of a Petition with the PEA that contains, at a minimum, (a) PEA-approved third-party analysis of the impact of the decommissioning and deconstruction on both the local and statewide levels; and (b) potential alternatives to decommissioning or deconstruction.

SB 609 does not mention West Virginia Code § 24-2-21a(a) (or other authority), which requires a public utility to obtain the "prior consent and approval" from the West Virginia Public Service Commission ("PSC") prior to retiring, abandoning, closing, or otherwise rendering permanently incapable of operating any electric generating plant or unit. *Id.* Thus, the PSC's jurisdiction in this regard is unaltered by SB 609.

In the Emergency Rules, the PEA proposes that its review shall occur only after approval has been received from the PSC. *See* Emergency Rules, § 4.2.4. Nothing in SB 609, whether expressly or by implication, makes the reviews required by the PSC or any other entity subordinate to the PEA's review. Thus, the Emergency Rules appear to empower the PEA in a manner that is not expressed in the implementing legislation.

The Emergency Rules should be amended such that the PEA's review occurs concurrently with the PSC's review as it relates to a generation plant owned by a public utility. Doing so reconciles SB 609 and West Virginia Code § 24-2-21a(a), both of which remain the law in West Virginia, and, as discussed below, it will solve timing problems that exist in the current

draft of the Emergency Rules.

Response: The Authority's review of Petitions is not superior to that of the PSC. Rather, the Authority's review of Petitions for decommissioning or deconstruction activities is separate and distinct from that of the PSC or other state agencies. Please also see the response to comment 5 above.

20. It Would be Administratively Inefficient and Cost Additive to Require Successive Proceedings Before the PSC and PEA Involving Similar Facts and Evidence.

Although the PEA and PSC are different regulatory bodies, there is likely to be overlap in the evidence that the PSC and PEA will require in order to render a decision. The Emergency Rules do not, however, create any efficiencies in these processes as they would obligate a public utility to participate in two different proceedings that will consider the same operative facts, separated only by time. This would not be an efficient use of resources or ratepayer dollars. The PEA should consider revising the Emergency Rules to provide for a concurrent proceeding that takes place at the same time as any PSC-mandated proceeding, or at least contemplate utilizing common evidence and submissions.

Response: Please see the responses to comments 5 and 19 above.

21. The PEA Should Consider How the Emergency Rules Could Address the Need to Resolve Conflicting Decisions from the PSC and PEA.

Because the West Virginia Legislature has made neither the PSC's nor PEA's review process superior to the other, this creates the possibility of conflicting decisions being issued. The Emergency Rules currently do not, however, provide a mechanism to reconcile these potentially contradictory decisions. The PEA should consider incorporating a mechanism into the Emergency Rules to address a conflicting decision with that of the PSC.

The Emergency Rules also omit any reference for reconsideration or appeal (presumably to the West Virginia Supreme Court) in the event an owner of a covered facility ("Petitioner") contests the PEA's decision. *See* Emergency Rules, § 8.3.1 (stating only that the PEA will explain the reasons for its decision to deny the petition, including why approval was not unreasonably withheld). The PEA should consider inclusion of such exigencies in the rules.

Response: Please see the responses to comments 5, 12, 19, and 20 above.

22. The Emergency Rules Should Approve the Third-Party Evaluator Prior to Any Filing with the PSC.

The PEA should consider amending the Emergency Rules with respect to the timing of approval of the third-party evaluator. Under the Emergency Rules, a Petitioner must first file a "Notice of Decommissioning or Deconstruction Activities" ("Notice") with the PEA that includes, among other things, the proposed third-party evaluator. *See* Emergency Rules, §§ 4.1, 4.2.9. The Notice, however, cannot be filed until after the Petitioner has received the

PSC's Order "approving decommissioning or deconstruction activities, if applicable." *Id.*, § 4.2.4. The Emergency Rules do not allow the third-party evaluator to be presented to the PEA for approval until after the PSC has approved a generating plant's closure.

The information to be presented to the PEA by the third-party evaluator may be equally relevant to the PSC's evaluation pursuant to West Virginia Code § 24-2-21a(a). The Emergency Rules create a situation where the Petitioner could rely on a neutral third-party for purposes of PSC approval only to have that third-party evaluator rejected by the PEA in a subsequent proceeding. Such an outcome could unnecessarily delay proceedings and increase costs.

To address this problem, the Emergency Rules could be amended to ensure that a third- party evaluator could be approved in sufficient time that a public utility could rely upon that expert's analysis, as appropriate, for any required approvals needed from the PSC.

Response: The Authority and the PSC are separate, and each review distinct requests for approval of decommissioning or deconstruction activities. However, if a third-party evaluator was involved in an action before the PSC, that would fall under the experience and qualifications considered by the Authority when approving a third-party evaluator. Thus, it is unnecessary to accelerate the approval of the third-party evaluator.

23. The Third-Party Evaluator Should Consider Both Negative and Positive Impacts of Decommissioning and Deconstruction.

The Emergency Rules require the third-party evaluator to analyze, using objective quantitative and qualitative data, the social, environmental, and economic impact that decommissioning or deconstructing a given generation resource will have on the state and local level. *See* Emergency Rules, §§ 5.1.1-5.1.3. The proposed rules, however, appear to focus almost exclusively on negative impacts, despite the fact that nothing in SB 609 limits the third-party evaluator's analysis in that regard. *See* West Virginia Code § 5d-1-5c(b)(1).

The third-party evaluator should conduct a neutral, unbiased analysis of both the negative and positive impacts of decommissioning and deconstruction. *See* Emergency Rules § 2.16 (noting that the third-party evaluator should conduct "an independent and unbiased analysis"). Examples of potential positive impacts that are not mentioned in the Emergency Rules include: reduced regulated rates if the Petitioner is a public utility and potential economic benefits from development of replacement or alternative resources, among others.

Response: The rule provides for consideration of the social, environmental, and economic impact of the potential decommissioning or deconstruction activities and does not limit those impacts to negative impacts. Petitioners are encouraged to submit all potential social, environmental, and economic impacts, both positive and negative, in a petition.

24. It is Not Clear How the Petitioner Could Notify PJM Interconnection, LLC ("PJM"), of Desired Deactivation Date Prior to PEA Approval.

As part of the Notice that precedes the filing of the Petition with the PEA, the Petitioner is

required to provide the "Deactivation Analysis performed by [PJM], if applicable." Emergency Rules, § 4.2.4; *see also id.* § 3.1.2. (citing PJM Manual 14D, Section 9: Generator Deactivation).

A required element of PJM's deactivation analysis requires the Petitioner to identify "[t]he desired date of deactivation." PJM Manual 14D, Section 9.1.1. It is unclear whether a Petitioner could notify PJM of its desired deactivation date without PEA approval and, as described below in Section 7, where the timing for receiving that approval is unknown.

There are also potential conflicts between the Emergency Rules and PJM's process if PJM's Deactivation Analysis identifies either reliability or power issues associated with deactivation because the Petitioner may be constrained in its ability to move forward consistent with PJM requirements without PEA approval. *See* PJM Manual 14D, Section 9.1.3. The PEA should ensure that the Emergency Rules do not pose a conflict with PJM's requirements related to deactivation. If the timing of PEA approval and PJM requirements are in conflict, it may constitute an instance of unreasonably withholding approval contrary to SB 609 because a Petitioner would never be able to comply with PJM's rules and the Emergency Rules.

Response: The rule does not conflict with PJM's Deactivation analysis. Section 9.1.1 of PJM Manual 14D requires only a "desired date of deactivation." Petitioners may provide this estimated date to PJM after factoring in the petition process.

25. The Emergency Rules Should Specify the Time Period within which the PEA will Render a Decision.

The Emergency Rules do not specify the time periods within which the PEA must act. For example, there is no deadline by which the PEA must approve or disapprove of the third-party evaluator proposed in the Notice. *See generally,* Emergency Rules, §§ 4.4.2 and 4.4.3 (specifying how long the Petitioner has to either propose another third-party administrator if their first choice is rejected or to perfect their appeal). Similarly, following the filing of the Petition, the Chair is authorized to request "additional information," which can also include seeking "an outside review of information submitted in the Petition," but there is no timeframe within which those requests or outside reviews must be made or conducted. *Id.*, §§ 8.1 and 8.1.1. Finally, there is also no stated deadline by which the PEA must render an ultimate decision on the Petition. *Id.*, § 8.2.

The PEA should propose reasonable deadlines by which the PEA will act vis-à-vis the various requirements set forth in the Emergency Rules, including approval of the third-party evaluator, seeking additional information and outside reviews, and rendering an ultimate decision on the Petition.

Response: Please see the responses to comments 4, 12, 19, 20, and 21 above.

26. There are Minor Language Changes that the PEA Should Consider Adopting.

Set forth below are additional changes to clarify the rules:

a. In Emergency Rule § 3.1.1, the PEA states that a utility regulated by the PSC must first obtain approval from the PSC in accordance with W. Va. Code §§ 24-1-1 and 24-2-5. Section 3.1.1 should be revised to also reference W. Va. Code § 24-2-21a(a) as it specifically applies to the closure of a generating facility. Furthermore, the reference to W. Va. Code § 24-1-1 should include "*et seq*." at the end to reflect its inclusion of the entirety of Article 2.

Response: The rule has been amended to reflect those suggested changes.

b. The term "alternative fuel source" is defined in Emergency Rule § 2.1; however, that phrase does not appear anywhere else in the Emergency Rules. In Emergency Rule § 5.1.1a, however, there is mention of "alternative fuels." If the phrase alternative fuels referenced in Section 5.1.1a are intended to refer to the "alternative fuel source" defined in Section 2.1, the Emergency Rules should be revised to use the same phrase in both sections.

Response: The rule has been amended to reflect the suggested change.

West Virginia Citizen Action Group

27. The Emergency Rule should provide a certain timeline

Under the Emergency Rule, responsibility for moving the petitioning process along passes between the petitioner and the Authority. As it stands now, two crucial parts of this review process lack a timeline (4.4 and 8.3). The Authority should amend the Emergency Rule to provide certain time limits at these steps of the process.

First the petitioner must file a Notice of Decommissioning or Deconstruction Activities with the Authority, including a proposed third-party evaluator. The Authority must then approve or deny the proposed third-party evaluator (4.4). If the Authority denies it, the petitioner has 30 days to propose a new evaluator (4.4.2); if Authority approves it, the petitioner has 90 days to perfect the petition (4.4.3). While the Emergency Rule imposes clear time limits on the petitioner, it is silent on a time limit for the Authority to approve or deny the petitioner's proposed third-party evaluator.

Once the petitioner has submitted a perfected petition, the Authority then must approve or deny it (8.3). Here, again, the Emergency Rule is silent on a timeline for the Authority to make this decision, but it imposes clear time limits on the petitioner: if the Authority denies the petition, the petitioner has 90 days to correct and resubmit it (8.3). While the Emergency Rule imposes specific time limits on the petitioner at every step of the petitioning process, it does not currently require the Authority to make its decisions within any particular timeframe. Given the risk of unreasonable administrative delay for petitioners, the Authority should amend the Emergency Rule to require that the Authority make its approval/denial decisions

(of the third party evaluator (4.4) and of the completed petition (8.2)) within a reasonable timeframe.

First, general fairness and transparency favor a certain timeline. A transparent and predictable timeline for the petitioning process will benefit petitioners, communities surrounding the facilities, and the broader interested public.

Second, the Authority is required by the West Virginia Constitution to operate without unreasonable delay. The West Virginia Constitution provides that "justice shall be administered without... delay." This requirement extends to administrative agencies performing quasi-judicial functions, which have an affirmative duty "to dispose promptly of matters properly submitted." When an authorizing statute is silent on time limits, "time limitations are often imposed by administrative agencies themselves through the promulgation of rules and regulations." Rather than leave a petitioner to wonder how long it may take to receive Authority approval of their proposed third-party evaluator and their petition, the Authority should amend the Emergency Rule to provide clear time limits in parts 4.4 and 8.2. Though a petitioner may have recourse in the courts to address agency delay, it would be unreasonably burdensome for the Authority to administer the Emergency Rule without clear time limits in the rule itself.

Response: Please see the responses to comments 4, 12, 19, 20, 21, and 25 above.

28. The Emergency Rule should clearly state its purpose

Currently, there is nothing on the face of the Emergency Rule to indicate what interest, exactly, the Emergency Rule has been implemented to serve. This makes it unclear how the Authority will make its approval or denial decisions, whether it has imposed needlessly rigorous requirements on petitioners, or if it duplicates the function of other agencies.
The authorizing statute in W. Va. Code 5d-1-5c does not state the purpose for having the Authority grant permission for deconstruction and decommissioning activities of power plants. While the Public Energy Authority Act sheds some light on the Authority's general function – with legislative findings like "the economy of the State of West Virginia needs a reliable and dependable market for the state's coal, natural gas and other natural resources" (W Va. Code 5D- 1-2(c)) – the best the Emergency Rule provides is that the Authority will consider the social, environmental, and economic impacts of the proposed activities and will not "unreasonably withhold" approval. (8.2).

The Emergency Rule defines "unreasonably withhold," however, so vaguely as to be useless in divining what considerations will go into the approval decision. The Authority should amend the definition to provide clearer indicia for denial of a petition. The Rule defines "unreasonably withhold" to mean "to withhold, arbitrarily and capriciously, the approval of decommissioning or deconstruction activities without consideration or regard for the facts and circumstances presented." This definition gives the Authority incredible latitude to deny petitions without any guidance about how to weigh the findings on environmental, economic, and social impact. It is also redundant, because the arbitrary and capricious standard is already the last recourse to

challenge agency actions. The arbitrary and capricious standard is a constitutional minimum on agency actions, not a substantive guidepost for the Authority to make decisions based on substantive findings about the social, environmental, and economic impacts of decommissioning/deconstruction activities.

It is also impossible to tell whether the petition requirements (enumerated in part 5) are relevant to the Authority's decision without knowing the purpose of the Authority's review. It is a tenet of fundamental fairness that only relevant evidence be used in decision making. The Emergency Rule, therefore, should only require as much information from the petitioner as will be relevant to the approval decision. Currently, though, the Emergency Rule requires the petitioner to turn over a wide swath of information. This includes, for instance, not only an analysis of the jobs that might be lost at the facility, but also the jobs that might be lost from vendors that provide services to the Facility, and the impact on revenues for local school districts. (5.1.3(a)-(c)).

The Emergency Rule also currently requires information from petitioners that is likely to duplicate the functions of other agencies. Under part 5.1.2, the environmental analysis, a petitioner must provide information on environmental issues that are already regulated by the Department of Environmental Protection ("DEP") (like compliance with Title V permits, 5.1.2.b, and the information of current liable parties, 5.1.2.a). It also requires eligible petitioners to get approvals from the Public Service Commission ("PSC") or PJM for the proposed decommissioning activities (3.1.1-2) and it requires copies of all federal, state, and local permits that are in effect. (5.2.2.) Each of these agencies – DEP, PSC, PJM, and the federal, state, and local permitting authorities – already address important issues in the public interest, like environmental protection, rate-setting, and grid reliability. While the Authority demands permits and information from petitions broadly across all these areas, it is unclear what interest the Emergency Rule promotes, why all this information is needed to promote it, and how it is not already covered by the missions of these other agencies.

Response: Please see the response to comment 9 above.

29. The Emergency Rule should ensure adequate process to petitioners

The current Emergency Rule risks infringing on petitioners' due process rights.

One fundamental element of fairness is the right to know the evidence and to have a decision based only on relevant, presented evidence. Article 5 of the West Virginia Administrative Procedures Act, outlining the procedure for hearings in "contested cases" in administrative agencies, provides that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded" (29A-5-2(a)). All evidence shall be offered and made a part of the record, and "no other factual information or evidence shall be considered in the determination of the case" (29A-5-2(b)).

The Emergency Rule is internally inconsistent and needs clarification on what evidence can form the basis for the Authority's approval or denial decision. Part 8.2 suggests that the Authority's decision is based on the facts and circumstances presented in the Petition and the public comments ("the Authority will approve the petition if... based on the facts and

circumstances presented in the petition and the public comments, it would be unreasonable to withhold approval" 8.2). Part 8.3.1, however, suggests that a denial can be based only on the facts and circumstances presented in the petition ("if the Authority, after considering the facts and circumstances presented in the petition, denies the petition..." 8.3.1). The Authority should revise these provisions to make clear what material can go into the Authority's ultimate decision, and if it includes public comments or additional information requested by the Authority.

Another fundamental element of fairness is the ability to confront and contest evidence offered by opposing parties. Article 5 guarantees this right. For example, every party has the right to cross-examine testifying witnesses and "the right to submit rebuttal evidence" (29A-5-2(c)); and all parties shall be given notice of judicially cognizable facts "and they shall be afforded an opportunity to contest the facts so noticed" (29A-5-2(d)). Article 5 also provides that before a final decision, parties may offer findings of fact or conclusions of law, and "all other parties shall be given an opportunity to except to such proposed findings and conclusions" (29A-5-3).

Here, before rendering a decision, the Chair may request additional information from any party they believe has "interest, information, or expertise related to the Petition" (8.1). Requests for additional information will be made public on the Authority's website and the Petitioner is entitled to a copy of the additional information, but is not guaranteed a right to respond, rebut, or object to the additional information. The Authority should amend part 8.1 of the Emergency Rule to provide the Petitioner with a chance to respond to this additional information before the Chair makes a final decision.

In addition, if the Authority can consider public comments, under the current Rule the petitioner has no opportunity to respond and rebut to the information in the comments. If public comments can be a basis for the Authority's decision, the Emergency Rule should provide the petitioner an opportunity to respond to and contest the public comments.

Response: The rule has been amended to provide petitioners the opportunity to respond to any additional information and any public comments submitted to the Authority.

SIERRA CLUB

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June 22, 2023

RE: Comments on 53-CSR-5: Emergency rule for power plant closure

We have reviewed the Emergency rule as authorized under SB 609 and offer a couple comments that may warrant some revision.

1) Section 53-5-6.4 requires "Certification of service to the entities listed in section 8.3 of this rule…". However, section 8.3 appears to be irrelevant to this requirement. Was that supposed to refer to section 6.3?
2) Section 53-5-7 describes a 30-day Public comment period, however, there does not seem to be any mechanism to notify the public of such a comment period. If there are nearby neighbors, plant workers or labor groups, businesses with outstanding claims, or environmental groups such as ourselves, it is not clear how any of us would ever find out about this in time to comment in a meaningful way. I recommend that a standard notice requirement such as "after notice by publication as a Class II legal advertisement in compliance with the provisions of §§3-3-1 *et seq.* of this code" be added to the rule.
3) Section 53-5-7.5 specifies that " …Public comments may be filed electronically on the Authority's website." However, I was not able to find a mechanism on the Authority's website for such public comments. The comment section at the bottom of that web page appears to be directed to the Department of Commerce generally, rather than the PEA specifically, as the same set-up is also on the pages for other boards and commissions. I recommend that the Public Comment mechanisms be established more clearly.

Section 53-5-8 lays out provisions for the PEA to approve or deny a petition, but there does not seem to be any time limit for the PEA to make such as decision. SB 609 specifies that " such approval may not be unreasonably withheld." (see 5D-1-5c (a)). We recognize that such a decision may take significant time and staff resources, but would be concerned that excessive delays would be tantamount to such approval being "unreasonably withheld". By way of precedent, the WV Public Service Commission "shall render a decision within 300 days…" (24-2-11c b)) for electric generating facilities siting certificates, and it may be useful for the PEA to decide if a longer period is needed in responding to a petition for decommissioning or deconstruction or whether longer than that constitutes a de facto denial.

Please let me know of nay other rules or procedures anticipated under SB 609. I also request to be notified of any petitions for decommissioning or deconstruction of fossil fuel fired power plants.

Thank you.

Jim Kotcon, Chair
WV Chapter of Sierra Club
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MonPower
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July 21, 2023

VIA EMAIL (graham.b.platz@wv.gov) AND OVERNIGHT DELIVERY

Mr. James Bailey, Chairman
WV Public Energy Authority
1900 Kanawha Blvd. East Building 3, Suite 800
Charleston, WV 25305

Subject: FirstEnergy Comments on Proposed Rule to Petition the PEA for Approval for Decommissioning or Deconstruction Activities Related to any Coal, Oil, or Natural Gas Fueled Power Plant

Dear Public Energy Authority and Mr. Bailey:

Monongahela Power Company ("Mon Power") and The Potomac Edison Company ("Companies") are two electric utilities serving approximately 550,000 customers in central, northern and eastern West Virginia. The Companies are operating utilities of FirstEnergy Corp. Mon Power owns and operates two large coal-fired base load power stations in their service territory known as Harrison Power Station and Ft. Martin Power Station. Mon Power purchases power from three other power stations. One station is the Bath County pumped storage project located in Bath County, Virginia which is owned by a subsidiary of Mon Power. The other two stations from which Mon Power purchases power are PURPA projects known as Grant Town and the Hannibal lock and dam on the Ohio River. Together, the Companies either own and operate or procure over 3600 MWs of electric power.

The Companies appreciate the opportunity to submit the following comments associated with the above referenced rule:

1. Scope (Section 1.1) – The Companies believe that the jurisdiction of these rules should apply to those power plants that are not directly regulated by the Public Service Commission. The PSC holds the power and jurisdiction to decide if a plant can be closed and to govern decommissioning and deconstruction through its orders and depreciation rates approved by the Commission. The depreciation rates of an electric utility charged to customers have cost of removal and salvage components specifically built into them and thus it is important that the PSC has exclusive authority over decommissioning of retired regulated utility plants to match the rate recovery for decommissioning. A second state agency should not

regulate what the PSC already regulates. It very well could lead to different decisions by both agencies or certainly inconsistent requirements. However, merchant plants, such as Pleasants and Longview, are not regulated by the PSC and thus it is appropriate for the PEA to regulate the closing activities of those plants not regulated by the PSC.

2. (Section 4.4) – The Companies believe the Authority should not have the right to approve any third-party evaluator to be used by the owner. The applicant should have the right to present its case with whomever the evaluator and witnesses it desires. The third-party evaluator consent proposed rule reads, in essence, "keep trying to find a third-party evaluator until you find one that we like." That requirement should be removed and unreasonably entwines the PEA in the presentation of the case before it to decide. Regardless, while noting the objection to the PEA controlling the presentation, if there is any such third party approval by the PEA, the Authority should have a time limit of no more than 45 days to act and should have finite and objective criteria for any selection.

3. (Section 5.1, Petition Requirements) The PEA petition requirements described in Section 5 require a broad range of technical, economic, and social assessments that likely will involve months of study time and hundreds of thousands of dollars of study costs. The requirements are extensive and may have the unintended consequence of incentivizing inaction after a plant stops generating electricity, i.e.., the generator owners may choose to avoid the complex and costly PEA process and do nothing other than to allow the plant to sit and deteriorate over decades.

4. (Section 5.3.1) - While the Companies support conciseness, a petition with a 5-page limit is not practical. The page limit doesn't seem to recognize the magnitude of the requested information and analysis. Most petitions have no page limit, however, if a limit is desirable, the Companies recommend a 20-page limit excluding attachments.

5. Section 8.2) – The Companies believe the legal standard for petition approval should be based on fairness, reasonableness and whether it is in the public interest. It should not be the legal standard in the proposed rule that it would not be unreasonable to approve.

6. (Section 8.2.2) – The Companies believe that environmental enforcement and remediation are within the exclusive jurisdiction of the WV Division of Environmental Protection and US EPA. The Companies respectfully believe PEA does not have jurisdiction over environmental matters and their enforcement. Seeking information on environmental matters is different and there is no objection to those provisions in the proposed rule.

7. (Section 8.3) - If the petition is denied, the rules say it may be resubmitted within 90 days. The Companies believe there should be no time limits on any resubmittal.

8. There should be added a section outlining an appeals process following any adverse decision or denial. It is assumed the appeal would be to the intermediate court of appeals, but the rule should address it for purposes of clarity and due process.

9. (Section 9.2.1) - There are various provisions that give powers to just the Chair, e.g., what information is confidential and in requests for additional information from the petitioner (Section 8.1.1). The Chair is one person from the Authority, and all actions of the PEA should be done by the Authority as a whole and not by just one member of PEA.

Mon Power and The Potomac Edison Company appreciate the opportunity to comment and would be more than willing to clarify or expound upon any of the comments filed herein. A public hearing on the rules may be worthwhile so that the PEA board members get a better understanding of the comments and concerns of those affected by the rules.

Sincerely,

Gary A. Jack
Senior Corporate Counsel
WV State Bar No. 1855

CC: PSC Chairman Charlotte Lane
PSC Commissioner Renee Larrick
PSC Commissioner Bill Raney

Appalachian Power
[redacted]
[redacted]
[redacted]

July 21, 2023

James Bailey, Chair
West Virginia Public Energy Authority
1900 Kanawha Blvd., East
Building 3, Suite 800
Charleston, WV 25305

RE: ***Rule to Petition the Public Energy Authority for Approval of Decommissioning or Deconstruction Activities Related to any Coal, Oil, or Natural Gas Fueled Power Plant***

Dear Chairman Bailey:

Appalachian Power Company ("APCo") appreciates the opportunity to comment on the proposed rule 53CSR05: *Rule to Petition the Public Energy Authority for Approval of Decommissioning or Deconstruction Activities Related to any Coal, Oil, or Natural Gas Fueled Power Plant.*

For background, APCo has 1 million customers in Virginia, West Virginia, and Tennessee (the latter as "AEP Appalachian Power"). APCo is part of the American Electric Power ("AEP") system. AEP's approximately 17,000 employees operate and maintain the nation's largest electricity transmission system and more than 224,000 miles of distribution lines to efficiently deliver safe, reliable power to nearly 5.6 million customers in 11 states. AEP is also one of the nation's largest electricity producers with approximately 31,000 megawatts of diverse generating capacity.

After a review of the proposed rule, APCo has several concerns. First, section 4.4.3 of the rule provides that if the Authority approves the Petitioner's choice of a third-party evaluator, the Petitioner shall have ninety (90) days from the issuance of the approval to perfect the petition. APCo feels that (90) ninety days is not sufficient time to perfect the petition once the third-party evaluator has been approved.

APCo's second concern is that section 5.2.10 requires a detailed list of the upgrades made to a Facility since its original construction, including but not limited to, the purpose of the upgrade, the date the upgrade was made, the date the upgrade was completed, and the cost of the completed upgrade. APCo submits that this requirement would be unduly burdensome given the length of time that APCo's power plants have been in operation.

APCo's third concern is that sections 5.3 and 5.3.1 of the rule limit a petition to a maximum of five pages without prior approval. With the number of petition requirements that are required in §53-5-5, it would be very difficult to provide all the information required within a mere five pages. With the volume of information that is required to be included, APCo would suggest removing the five-page limit requirement for petitions.

APCo's fourth concern is that section 8.2 touches upon approval of a petition by the Authority but has no timeline for an approval. APCo suggests that there should be a 180-day deadline for approval or disapproval by the Authority once it has received a petition.

APCo's fifth concern is that section 9.2 of the rule allows the Petitioner to include a letter outlining what information in the filing is confidential or proprietary. APCo believes that it is in the best position to determine what information is confidential or proprietary. APCo suggests that the rule be changed to allow for the petitioner to redact confidential and proprietary information and allow the Authority to request more information in a secure manner if it feels more information is needed regarding the redacted material.

Thank you again for the opportunity to comment on the proposed rule. APCo appreciates the Authority's careful consideration of these comments. Please do not hesitate to contact Sammy Gray at (681) 362-9543 or at slgray@aep.com if you have questions or would like to discuss the comments in more detail.

Sincerely,

Aaron D. Walker
President and COO

Carrie H. Grundmann
336.631.1051
cgrundmann@spilmanlaw.com

July 21, 2023

VIA E-MAIL
Mr. James Bailey
Chair
Public Energy Authority
1900 Kanawha Blvd.
East Building 3, Suite 800
Charleston, WV 25305
Graham.b.platz@wv.gov

Re: Comments of the West Virginia Energy Users Group and the West Virginia Manufacturers Association on Rule to Petition the Public Energy Authority for Approval of Decommissioning or Deconstruction Activities Related to any Coal, Oil, or Natural Gas Fueled Power Plant

Dear Mr. Bailey:

Please find attached the Comments of the West Virginia Energy Users Group and the West Virginia Manufacturers Association regarding the above-referenced matter.

Please contact the undersigned if you have any questions concerning this filing.

Respectfully submitted,

Carrie H. Grundmann (WV State Bar #11324)

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Counsel to the West Virginia Manufacturers Association

CHG.sds
Enclosure

RULE TO PETITION THE PUBLIC ENERGY AUTHORITY FOR APPROVAL OF DECOMMISSIONING OR DECONSTRUCTION ACTIVITIES RELATED TO ANY COAL, OIL, OR NATURAL GAS FUELED POWER PLANT

COMMENTS OF THE WEST VIRGINIA ENERGY USERS GROUP AND THE WEST VIRGINIA MANUFACTURERS ASSOCIATION

In the 2023 Legislative Session, the West Virginia Legislature passed Senate Bill ("SB") 609, and Governor Justice signed it into law on March 8, 2023. Under SB 609, the Public Energy Authority ("PEA") must now pre-approve any "decommissioning or deconstruction activities" of an existing coal, oil, or natural gas-fired electric generating plant located in the State of West Virginia. *See* West Virginia Code § 5d-1-5c(a). The legislation also obligates the PEA to promulgate emergency rules to implement the requirements of the law.

On June 23, 2023, the West Virginia Secretary of State ("SOS") published a Notice of an Emergency Rule ("Emergency Rules") in accordance with the requirements of SB 609. *See* West Virginia Code § 5d-1-5c(c). Pursuant to the West Virginia Register published by the SOS on June 30, 2023, the deadline to submit written comments is 4:30 PM EST on July 23, 2023. *See* West Virginia Register, p. 8 (dated June 30, 2023). The West Virginia Manufacturers Association ("WVMA") and the West Virginia Energy Users Group ("WVEUG") jointly submit these Comments to the Emergency Rules in accordance with the deadline and state as follows:

1. **SB 609 Did Not Designate the PEA as the Final Authority on Decommissioning or Deconstructing Electric Generating Plants.**

SB 609 directed the PEA to "propose rules for legislative approval and promulgate emergency rules…to implement this section." West Virginia Code § 5d-1-5c(c). "This section" is a succinct piece of legislation that:

(1) Prohibits an "existing coal, oil or natural gas fueled power plant" from undertaking any "decommissioning or deconstruction activities prior to obtaining approval" from the PEA, except that the approval "may not be unreasonably withheld"; and,

(2) Requires the filing of a Petition with the PEA that contains, at a minimum, (a) PEA-approved third-party analysis of the impact of the decommissioning and deconstruction on both the local and statewide levels; and (b) potential alternatives to decommissioning or deconstruction.

SB 609 does not mention West Virginia Code § 24-2-21a(a) (or other authority), which requires a public utility to obtain the "prior consent and approval" from the West Virginia Public Service Commission ("PSC") prior to retiring, abandoning, closing, or otherwise rendering permanently incapable of operating any electric generating plant or unit. *Id.* Thus, the PSC's jurisdiction in this regard is unaltered by SB 609.

In the Emergency Rules, the PEA proposes that its review shall occur only after approval has been received from the PSC. *See* Emergency Rules, § 4.2.4. Nothing in SB 609, whether

expressly or by implication, makes the reviews required by the PSC or any other entity subordinate to the PEA's review. Thus, the Emergency Rules appear to empower the PEA in a manner that is not expressed in the implementing legislation.

The Emergency Rules should be amended such that the PEA's review occurs concurrently with the PSC's review as it relates to a generation plant owned by a public utility. Doing so reconciles SB 609 and West Virginia Code § 24-2-21a(a), both of which remain the law in West Virginia, and, as discussed below, it will solve timing problems that exist in the current draft of the Emergency Rules.

2. It Would be Administratively Inefficient and Cost Additive to Require Successive Proceedings Before the PSC and PEA Involving Similar Facts and Evidence.

Although the PEA and PSC are different regulatory bodies, there is likely to be overlap in the evidence that the PSC and PEA will require in order to render a decision. The Emergency Rules do not, however, create any efficiencies in these processes as they would obligate a public utility to participate in two different proceedings that will consider the same operative facts, separated only by time. This would not be an efficient use of resources or ratepayer dollars. The PEA should consider revising the Emergency Rules to provide for a concurrent proceeding that takes place at the same time as any PSC-mandated proceeding, or at least contemplate utilizing common evidence and submissions.

3. The PEA Should Consider How the Emergency Rules Could Address the Need to Resolve Conflicting Decisions from the PSC and PEA.

Because the West Virginia Legislature has made neither the PSC's nor PEA's review process superior to the other, this creates the possibility of conflicting decisions being issued. The Emergency Rules currently do not, however, provide a mechanism to reconcile these potentially contradictory decisions. The PEA should consider incorporating a mechanism into the Emergency Rules to address a conflicting decision with that of the PSC.

The Emergency Rules also omit any reference for reconsideration or appeal (presumably to the West Virginia Supreme Court) in the event an owner of a covered facility ("Petitioner") contests the PEA's decision. *See* Emergency Rules, § 8.3.1 (stating only that the PEA will explain the reasons for its decision to deny the petition, including why approval was not unreasonably withheld). The PEA should consider inclusion of such exigencies in the rules.

4. The Emergency Rules Should Approve the Third-Party Evaluator Prior to Any Filing with the PSC.

The PEA should consider amending the Emergency Rules with respect to the timing of approval of the third-party evaluator. Under the Emergency Rules, a Petitioner must first file a "Notice of Decommissioning or Deconstruction Activities" ("Notice") with the PEA that includes, among other things, the proposed third-party evaluator. *See* Emergency Rules, §§ 4.1, 4.2.9. The Notice, however, cannot be filed until after the Petitioner has received the PSC's Order "approving decommissioning or deconstruction activities, if applicable." *Id.*, § 4.2.4. The Emergency Rules do not allow the third-party evaluator to be presented to the PEA for approval until after the PSC has approved a generating plant's closure.

The information to be presented to the PEA by the third-party evaluator may be equally relevant to the PSC's evaluation pursuant to West Virginia Code § 24-2-21a(a). The Emergency Rules create a situation where the Petitioner could rely on a neutral third-party for purposes of PSC approval only to have that third-party evaluator rejected by the PEA in a subsequent proceeding. Such an outcome could unnecessarily delay proceedings and increase costs.

To address this problem, the Emergency Rules could be amended to ensure that a third-party evaluator could be approved in sufficient time that a public utility could rely upon that expert's analysis, as appropriate, for any required approvals needed from the PSC.

5. The Third-Party Evaluator Should Consider Both Negative and Positive Impacts of Decommissioning and Deconstruction.

The Emergency Rules require the third-party evaluator to analyze, using objective quantitative and qualitative data, the social, environmental, and economic impact that decommissioning or deconstructing a given generation resource will have on the state and local level. *See* Emergency Rules, §§ 5.1.1-5.1.3. The proposed rules, however, appear to focus almost exclusively on negative impacts, despite the fact that nothing in SB 609 limits the third-party evaluator's analysis in that regard. *See* West Virginia Code § 5d-1-5c(b)(1).

The third-party evaluator should conduct a neutral, unbiased analysis of both the negative and positive impacts of decommissioning and deconstruction. *See* Emergency Rules § 2.16 (noting that the third-party evaluator should conduct "an independent and unbiased analysis"). Examples of potential positive impacts that are not mentioned in the Emergency Rules include: reduced regulated rates if the Petitioner is a public utility and potential economic benefits from development of replacement or alternative resources, among others.

6. It is Not Clear How the Petitioner Could Notify PJM Interconnection, LLC ("PJM"), of Desired Deactivation Date Prior to PEA Approval.

As part of the Notice that precedes the filing of the Petition with the PEA, the Petitioner is required to provide the "Deactivation Analysis performed by [PJM], if applicable." Emergency Rules, § 4.2.4; *see also id.* § 3.1.2. (citing PJM Manual 14D, Section 9: Generator Deactivation).

A required element of PJM's deactivation analysis requires the Petitioner to identify "[t]he desired date of deactivation." PJM Manual 14D, Section 9.1.1.[1] It is unclear whether a Petitioner could notify PJM of its desired deactivation date without PEA approval and, as described below in Section 7, where the timing for receiving that approval is unknown.

There are also potential conflicts between the Emergency Rules and PJM's process if PJM's Deactivation Analysis identifies either reliability or power issues associated with deactivation because the Petitioner may be constrained in its ability to move forward consistent with PJM requirements without PEA approval. *See* PJM Manual 14D, Section 9.1.3. The PEA should ensure that the Emergency Rules do not pose a conflict with PJM's requirements related to deactivation. If the timing of PEA approval and PJM requirements are in conflict, it may constitute an instance

[1] PJM Manual 14D is available at https://www.pjm.com/-/media/documents/manuals/m14d.ashx

of unreasonably withholding approval contrary to SB 609 because a Petitioner would never be able to comply with PJM's rules and the Emergency Rules.

7. The Emergency Rules Should Specify the Time Period within which the PEA will Render a Decision.

The Emergency Rules do not specify the time periods within which the PEA must act. For example, there is no deadline by which the PEA must approve or disapprove of the third-party evaluator proposed in the Notice. *See generally,* Emergency Rules, §§ 4.4.2 and 4.4.3 (specifying how long the Petitioner has to either propose another third-party administrator if their first choice is rejected or to perfect their appeal). Similarly, following the filing of the Petition, the Chair is authorized to request "additional information," which can also include seeking "an outside review of information submitted in the Petition," but there is no timeframe within which those requests or outside reviews must be made or conducted. *Id.*, §§ 8.1 and 8.1.1. Finally, there is also no stated deadline by which the PEA must render an ultimate decision on the Petition. *Id.*, § 8.2.

The PEA should propose reasonable deadlines by which the PEA will act vis-à-vis the various requirements set forth in the Emergency Rules, including approval of the third-party evaluator, seeking additional information and outside reviews, and rendering an ultimate decision on the Petition.

8. There are Minor Language Changes that the PEA Should Consider Adopting.

Set forth below are additional changes to clarify the rules:

a. In Emergency Rule § 3.1.1, the PEA states that a utility regulated by the PSC must first obtain approval from the PSC in accordance with W. Va. Code §§ 24-1-1 and 24-2-5. Section 3.1.1 should be revised to also reference W. Va. Code § 24-2-21a(a) as it specifically applies to the closure of a generating facility. Furthermore, the reference to W. Va. Code § 24-1-1 should include "*et seq*." at the end to reflect its inclusion of the entirety of Article 2.

b. The term "alternative fuel source" is defined in Emergency Rule § 2.1; however, that phrase does not appear anywhere else in the Emergency Rules. In Emergency Rule § 5.1.1a, however, there is mention of "alternative fuels." If the phrase alternative fuels referenced in Section 5.1.1a are intended to refer to the "alternative fuel source" defined in Section 2.1, the Emergency Rules should be revised to use the same phrase in both sections.

Respectfully submitted:

The West Virginia Energy Users Group

The West Virginia Manufactures Association

Dated: July 21, 2023

July 23, 2023

James Bailey, Chair
Graham Platz
1900 Kanawha Boulevard, East Bldg. 3, Suite 800
Charleston, WV 25305
Graham.b.platz@wv.gov

Re: Rule to Petition the Public Energy Authority for Approval of Decommissioning or Deconstruction Activities Related to Any Coal, Oil, or Natural Gas Fueled Power Plant

Dear Chairman Bailey:

West Virginia Citizen Action Group respectfully submits the following comment regarding the Emergency Rule to Petition the Public Energy Authority ("the Authority") for Approval of Decommissioning or Deconstruction Activities Related to Any Coal, Oil, or Natural Gas Fueled Power Plant ("the Emergency Rule"), which was filed on June 14, 2023.

First, the Authority should guarantee a certain timeline to the petitioning process by revising sections 4.4 and 8.3 to give time limits to the Authority's approval or denial of a third-party evaluator and the perfected petition. Second, the Emergency Rule should clearly state its purpose to ensure that petitioners need only provide relevant material. Finally, the Emergency Rule should ensure adequate process to petitioners by making clear what evidentiary basis can be used in the final approval or denial decision and providing petitioners an opportunity to rebut the public comments or information from third parties.

The Emergency Rule should provide a certain timeline

Under the Emergency Rule, responsibility for moving the petitioning process along passes between the petitioner and the Authority. As it stands now, two crucial parts of this review process lack a timeline (4.4 and 8.3). The Authority should amend the Emergency Rule to provide certain time limits at these steps of the process.

First the petitioner must file a Notice of Decommissioning or Deconstruction Activities with the Authority, including a proposed third-party evaluator. The Authority must then approve or deny the proposed third-party evaluator (4.4). If the Authority denies it, the petitioner has 30 days to propose a new evaluator (4.4.2); if Authority approves it, the petitioner has 90 days to perfect the petition (4.4.3). While the Emergency Rule imposes clear time limits on the petitioner, it is silent on a time limit for the Authority to approve or deny the petitioner's proposed third-party evaluator.

Once the petitioner has submitted a perfected petition, the Authority then must approve or deny it (8.3). Here, again, the Emergency Rule is silent on a timeline for the Authority to make this decision, but it imposes clear time limits on the petitioner: if the Authority denies the petition, the petitioner has 90 days to correct and resubmit it (8.3). While the Emergency Rule imposes specific time limits on the petitioner at every step of the petitioning process, it does not currently require the Authority to make its decisions within any particular timeframe. Given the risk of

unreasonable administrative delay for petitioners, the Authority should amend the Emergency Rule to require that the Authority make its approval/denial decisions (of the third party evaluator (4.4) and of the completed petition (8.2)) within a reasonable timeframe.

First, general fairness and transparency favor a certain timeline. A transparent and predictable timeline for the petitioning process will benefit petitioners, communities surrounding the facilities, and the broader interested public.

Second, the Authority is required by the West Virginia Constitution to operate without unreasonable delay. The West Virginia Constitution provides that "justice shall be administered without... delay."[1] This requirement extends to administrative agencies performing quasi-judicial functions, which have an affirmative duty "to dispose promptly of matters properly submitted."[2] When an authorizing statute is silent on time limits, "time limitations are often imposed by administrative agencies themselves through the promulgation of rules and regulations."[3] Rather than leave a petitioner to wonder how long it may take to receive Authority approval of their proposed third-party evaluator and their petition, the Authority should amend the Emergency Rule to provide clear time limits in parts 4.4 and 8.2. Though a petitioner may have recourse in the courts to address agency delay,[4] it would be unreasonably burdensome for the Authority to administer the Emergency Rule without clear time limits in the rule itself.

The Emergency Rule should clearly state its purpose

Currently, there is nothing on the face of the Emergency Rule to indicate what interest, exactly, the Emergency Rule has been implemented to serve. This makes it unclear how the Authority will make its approval or denial decisions, whether it has imposed needlessly rigorous requirements on petitioners, or if it duplicates the function of other agencies.

The authorizing statute in W. Va. Code 5d-1-5c does not state the purpose for having the Authority grant permission for deconstruction and decommissioning activities of power plants. While the Public Energy Authority Act sheds some light on the Authority's general function – with legislative findings like "the economy of the State of West Virginia needs a reliable and dependable market for the state's coal, natural gas and other natural resources" (W Va. Code 5D-1-2(c)) – the best the Emergency Rule provides is that the Authority will consider the social, environmental, and economic impacts of the proposed activities and will not "unreasonably withhold" approval. (8.2).

The Emergency Rule defines "unreasonably withhold," however, so vaguely as to be useless in divining what considerations will go into the approval decision. The Authority should amend the

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[1] W.Va. Const. art. III, § 17

[2] *Allen v. State, Hum. Rts. Comm'n*, 324 S.E.2d 99, 101 (W. Va. 1984).

[3] *Id.* at 119.

[4] If an agency does not explicitly provide time limitations, "time limitations are implicitly imposed by the demands of procedural due process." *Id.* If agencies unreasonably delay an administrative process, West Virginia courts may compel action through a writ of mandamus. *Id.* at 116 ("This Court has also consistently held that administrative delay may be subject to a writ of mandamus compelling action.").

definition to provide clearer indicia for denial of a petition. The Rule defines "unreasonably withhold" to mean "to withhold, arbitrarily and capriciously, the approval of decommissioning or deconstruction activities without consideration or regard for the facts and circumstances presented." This definition gives the Authority incredible latitude to deny petitions without any guidance about how to weigh the findings on environmental, economic, and social impact. It is also redundant, because the arbitrary and capricious standard is already the last recourse to challenge agency actions.[5] The arbitrary and capricious standard is a constitutional minimum on agency actions, not a substantive guidepost for the Authority to make decisions based on substantive findings about the social, environmental, and economic impacts of decommissioning/deconstruction activities.

It is also impossible to tell whether the petition requirements (enumerated in part 5) are relevant to the Authority's decision without knowing the purpose of the Authority's review. It is a tenet of fundamental fairness that only relevant evidence be used in decision making.[6] The Emergency Rule, therefore, should only require as much information from the petitioner as will be relevant to the approval decision. Currently, though, the Emergency Rule requires the petitioner to turn over a wide swath of information. This includes, for instance, not only an analysis of the jobs that might be lost at the facility, but also the jobs that might be lost from vendors that provide services to the Facility, and the impact on revenues for local school districts. (5.1.3(a)-(c)).

The Emergency Rule also currently requires information from petitioners that is likely to duplicate the functions of other agencies. Under part 5.1.2, the environmental analysis, a petitioner must provide information on environmental issues that are already regulated by the Department of Environmental Protection ("DEP") (like compliance with Title V permits, 5.1.2.b, and the information of current liable parties, 5.1.2.a). It also requires eligible petitioners to get approvals from the Public Service Commission ("PSC") or PJM for the proposed decommissioning activities (3.1.1-2) and it requires copies of all federal, state, and local permits that are in effect. (5.2.2.) Each of these agencies – DEP, PSC, PJM, and the federal, state, and local permitting authorities – already address important issues in the public interest, like environmental protection, rate-setting, and grid reliability. While the Authority demands permits and information from petitions broadly across all these areas, it is unclear what interest the

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[5] *In re Queen*, 473 S.E.2d 483, 485 (W. Va. 1996) ("An appellate court may reverse a decision of the Correctional Officers' Civil Service Commission as clearly wrong or arbitrary or capricious only if the Commission used a misapplication of the law, entirely failed to consider an important aspect of the problem, offered an explanation that ran counter to the evidence before the Commission, or offered one that was so implausible that it could not be ascribed to a difference in view or the product of Commission expertise... The "clearly wrong" and the "arbitrary and capricious" standards of review are deferential ones which presume an agency's actions are valid as long as the decision is supported by substantial evidence or by a rational basis.").

[6] In West Virginia courts, for example, irrelevant evidence is not admissible. (West Virginia Rules of Evidence, 402(d)); likewise in agency hearings on contested cases, irrelevant evidence may not be considered. W. Va. Code § 29A-5-2(a) ("In contested cases irrelevant, immaterial, or unduly repetitious evidence shall be excluded.").

Emergency Rule promotes, why all this information is needed to promote it, and how it is not already covered by the missions of these other agencies.

The Emergency Rule should ensure adequate process to petitioners

The current Emergency Rule risks infringing on petitioners' due process rights.

One fundamental element of fairness is the right to know the evidence and to have a decision based only on relevant, presented evidence.[7] Article 5 of the West Virginia Administrative Procedures Act, outlining the procedure for hearings in "contested cases" in administrative agencies, provides that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded" (29A-5-2(a)). All evidence shall be offered and made a part of the record, and "no other factual information or evidence shall be considered in the determination of the case" (29A-5-2(b)).

The Emergency Rule is internally inconsistent and needs clarification on what evidence can form the basis for the Authority's approval or denial decision. Part 8.2 suggests that the Authority's decision is based on the facts and circumstances presented in the Petition and the public comments ("the Authority will approve the petition if... based on the facts and circumstances presented in the petition and the public comments, it would be unreasonable to withhold approval" 8.2). Part 8.3.1, however, suggests that a denial can be based only on the facts and circumstances presented in the petition ("if the Authority, after considering the facts and circumstances presented in the petition, denies the petition..." 8.3.1). The Authority should revise these provisions to make clear what material can go into the Authority's ultimate decision, and if it includes public comments or additional information requested by the Authority.

Another fundamental element of fairness is the ability to confront and contest evidence offered by opposing parties.[8] Article 5 guarantees this right. For example, every party has the right to cross-examine testifying witnesses and "the right to submit rebuttal evidence" (29A-5-2(c)); and all parties shall be given notice of judicially cognizable facts "and they shall be afforded an opportunity to contest the facts so noticed" (29A-5-2(d)). Article 5 also provides that before a final decision, parties may offer findings of fact or conclusions of law, and "all other parties shall be given an opportunity to except to such proposed findings and conclusions" (29A-5-3).

Here, before rendering a decision, the Chair may request additional information from any party they believe has "interest, information, or expertise related to the Petition" (8.1). Requests for additional information will be made public on the Authority's website and the Petitioner is entitled to a copy of the additional information, but is not guaranteed a right to respond, rebut, or object to the additional information. The Authority should amend part 8.1 of the Emergency Rule to provide the Petitioner with a chance to respond to this additional information before the Chair makes a final decision.

In addition, if the Authority can consider public comments, under the current Rule the petitioner has no opportunity to respond and rebut to the information in the comments. If public comments can be a basis for the Authority's decision, the Emergency Rule should provide the petitioner an opportunity to respond to and contest the public comments.

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[7] Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1282 (1975).
[8] *Id.*

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Thank you for considering our comments. We can provide additional information upon request.

Sincerely,

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